

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

THE BENNETT FUNDING GROUP, INC.

Debtors

CASE NO. 96-61376

Chapter 11

Substantively Consolidated

APPEARANCES:

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Of Counsel

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the First Interim Application for Allowance of Fees and Expenses ("First Interim Application" or "Application") of Poorman-Douglas Corporation ("PDC"), as amended and filed on July 24, 1998. The First Interim Application covers the period from July 12, 1997 through May 20, 1998, and seeks fees of \$242,285.50, together with expenses of \$67,618.25. On September 14, 1998, the United States Trustee ("UST") filed an objection to the Application in which he questions PDC's billing the estate for \$2,450 in travel time, representing 98 hours of travel between New York and Oregon. The UST also objects to billing the estate for the airfare of two individuals at what he asserts is the rate for first class seating.

The First Interim Application was initially scheduled for a hearing on September 10, 1998, and was subsequently adjourned on several occasions. On December 3, 1998, the Court heard oral argument and requested that PDC provide the Court with a narrative explaining the

basis for its fee request being significantly over budget.¹ The matter was submitted for decision by the Court following the hearing.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (b)(2)(A) and (O).

FACTS AND DISCUSSION

By Order dated July 29, 1997, PDC was retained as claims agent pursuant to 28 U.S.C. § 156(c) in the substantively consolidated cases of The Bennett Funding Group, Inc., Bennett Receivables Corporation, Bennett Receivables Corporation II, Bennett Management & Development Corporation, The Processing Center, Inc., Resort Service Company, Inc., American Marine International, Ltd. and Aloha Capital Corporation (the “Debtors”). According to the Trustee’s Motion), PDC was retained

to do a major portion of the work that must be done with regard to claims. This would include: classifying claims as secured, unsecured or priority; assisting the Trustee’s in-house staff and outside professionals identify duplicative and other suspect claims and thereafter assist in generating reports for use in the claims objection process; generate mailing lists for use in claims objection, disclosure statement, balloting or other purposes;

¹ The original estimated budget for the services to be performed by PDC as claims agent was forecasted to be \$68,825. See motion filed by chapter 11 trustee, Richard C. Breeden (“Trustee”) on July 15, 1997 (“Trustee’s Motion”).

generate ballots and later collect, categorize and tabulate ballots that are ultimately received; and working with the Trustee's staff and the Clerk's Office with regard to their needs for information regarding claims.

See ¶ 5 of the Trustee's Motion. In addition,

[t]he Trustee proposes that Poorman review all proofs of claim so as to expand the official docket to include all classification information that will be required by the Trustee in determining whether claims should be allowed as filed or should be objected to. Because of its manpower and experience in claims review, Poorman will be able to complete this essential task efficiently and economically. These expanded schedules would be entered on Poorman's proprietary software which will be accessible by the Trustee's in-house staff in the reconciliation process. The software allows the Trustee's staff to categorize claims as needed, e.g. investor claims, bank claims, security deposit holders and trade creditors; to compare docketed amounts with scheduled amounts; and to generate reports for use in claims objections.

See id. at ¶ 10.

In a letter dated July 9, 1997, from the Trustee to Richard Zeh, Clerk of the Court, the Trustee sought "to define Poorman Douglas' role in a manner that would serve the needs, and meet the requirements of the Clerk's office. * * * Poorman Douglas' work will include clarifying claims as secured, unsecured or priority; reconciling the claim amounts against the schedules of liabilities; and identifying duplicative and other suspect claims." *See id.* at Exhibit A.

According to Laura L. DiBiase, Esq. ("DiBiase"), PDC's Bankruptcy Product Manager, PDC agreed to (a) key all claim information, (b) analyze and verify the accuracy of the information and (c) install the originally scheduled information and then create a database to be used by the Trustee/Debtors in conducting a reconciliation process. *See* Affidavit of DiBiase in Support of the First Interim Application, filed September 22, 1998 ("First Affidavit"). The Trustee signed an agreement with PDC on July 23, 1997. *See* Exhibit "A" of First Interim

Application. The same agreement was then signed by representatives of PDC on or about August 12, 1997. *See id.*

At some point, allegedly it became apparent that reconciliation would not be possible because the Debtors' system was comprised of vendor numbers assigned to each "purchase;" whereas, the creditors often "lumped" their investments into a single amount or claim. As a result, PDC created a "more substantial database" than was originally envisioned. *See First Affidavit. at ¶ 3.*

PDC also created a format "which allowed the Debtor to print and send a notice to each individual investor and prepare an Objection which it filed with the Court." *Id. at ¶ 4.* The notice includes a profit calculation and a "Ponzi profit calculation based on the Bennett system" in connection with the creditor's allowed claim. *Id.* The cost for this format, as well as the creation of an upgraded database, admittedly had not been included in the original estimated budget.

At the hearing on December 3, 1998, the Court requested that PDC provide it with a narrative which would explain the substantial discrepancy between the estimated budget of \$68,825 and the fees sought herein, namely \$242,285.50, which is approximately 3.5 times that of the estimated budget. Other than the explanation noted above, which was found in both DiBiase's First Affidavit and in one filed on December 23, 1998 ("Second Affidavit) apparently in response to the Court's request for further narrative, the only additional support for the fee request is found at Exhibit "B" of Second Affidavit.

According to Exhibit "B", PDC's initial assumption was that there would be a one time schedule conversion process and, instead, PDC was required to make "multiple amendments and updates," as well as "numerous claimant address correction comparisons." Given the complexity

of this case and PDC's knowledge that over 30,000 claims had been filed in this case, as well as PDC's purported experience in the business of claims processing in "numerous large cases" (*see* Trustee's Motion at ¶ 8), the Court is of the opinion that PDC should have been aware of the possibility of amendments and address corrections and taken them into account when it proposed its budget.

Under the headings of "Proof of Claim Input," "Reconciliation" and "Technical Support/Programming" found in Exhibit "B", it appears that PDC has made an effort to explain the expanded nature of other services it was asked to perform by the Trustee. While helpful, the Court requires additional facts in order for it to understand the necessity of the services, which appear to be beyond the scope of the original retention, and their benefit to the estate. Accordingly, the Court requires an affidavit from the Trustee in support of PDC's application which addresses the above concerns and explains why no supplemental request was made to expand the scope of PDC's services beyond what was originally contemplated and budgeted.

Transportation of Proofs of Claim

In response to the UST's concerns about expenses incurred with respect to the shipment of the proofs of claim to Oregon, DiBiase offers the following explanation: On August 6, 1997, employees of the United Parcel Service ("UPS") went on strike. *See* DeBiase's Affidavit at ¶ 7. DiBiase alleges that because the "strike appeared to be of long duration," PDC flew two of its employees to New York on August 12, 1997. *Id.* Sixty-six boxes of claims were loaded into a rental truck and the two employees then drove it across the country, arriving in Oregon on or about August 18, 1997. *See* ¶5 of PDC's First Interim Application. PDC is billing the estate for

\$2,450 in fees for 8 hours per day for the two employees even though it is alleged they actually averaged 14-15 hours per day on the road between August 12, 1997 and August 17, 1997. In addition, PDC requests reimbursement for airfare of \$852 for each of the two from Oregon to New York, which according to PDC, was at a rate the same as first class because it was booked the same day as the actual travel. The First Interim Application also reveals that the cost of renting the van to transport the claims was \$2,198.75. Lodging, meals, tolls and gasoline amounted to \$1,265.16, for a total cost of \$7,617.91 in fees and expenses. The reason given for this procedure was that “no one thought it was appropriate to leave the boxes in the Judge’s courtroom” *See* DiBiase’s Affidavit at ¶ 7.

Nothing in the First Interim Application or DiBiase’s two affidavits, other than her suggestion that the “clerk’s office was anxious for . . . removal” of the boxes of claims, supports a finding that shipment of the proofs of claims in the manner described benefitted the estate. There is nothing to indicate that there was any sort of emergency or that there was any detriment to the estate if the claims temporarily remained in Utica, New York. The Court notes that although the courtroom was used for convenience in sorting and boxing up the claims in anticipation of shipment during the Judge’s absence, nothing prevented their being stored elsewhere in the Clerk’s offices during the pendency of the UPS strike. Accordingly, the Court will disallow \$1,225, in fees and \$2,583.95 in expenses incurred in connection with the transfer of the claims, subject to further information being provided by the Trustee indicating the need for the expedited shipment of the claims and the benefit to the Estate.

Pre-Retention Fees

The Order authorizing the Trustee to enter into a contract with PDC was granted at a hearing held on July 22, 1997, and was signed by the Court on July 29, 1997. There is nothing in the Order providing for the appointment of PDC as claims agent prior to July 22, 1997. Furthermore, the Trustee did not enter into the agreement with PDC until July 23, 1997, and representatives of PDC did not execute the agreement until August 12, 1997. The Court concludes that PDC is not entitled to payment for any services rendered prior to the date the Order was signed, namely July 29, 1997. Accordingly it will deny \$1,410.75 in fees.²

Fee Application

The First Interim Application seeks total fees of \$2,380.50 in connection with the preparation of PDC's fee application. The Court will disallow \$1,380.50, finding that \$100/month over the 10 month period under consideration reasonable.

Travel

As this Court has previously noted in this case, travel is compensable at one-half normal rates unless the Court is satisfied that work was performed during the travel. No affidavits have been provided by those individuals for whom compensation is sought to indicate the extent, if any, of work performed in the process of traveling between Oregon and New York. Accordingly, the Court will disallow \$2,066.75 of the total of \$4,132.50 being sought.

² There were no expenses incurred by PDC until August 3, 1997. *See* Exhibit "D" of the First Interim Application.

In conclusion, the Court will award total fees of \$63,122.50, the amount budgeted less the amounts disallowed (\$68,825 - 5,702.50) and expenses of \$65,034.30 (\$67,618.25 - 2,583.95) to be paid from unencumbered funds of the estate. The Court will withhold any determination regarding the balance of the fees, namely \$173,460.50, until receipt of an affidavit from the Trustee within thirty (30) days of the date of this Order explaining the necessity for the additional services and their benefit to the consolidated estate.

IT IS SO ORDERED.

Dated at Utica, New York

this 31st day of March 1999

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge